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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK TORRES,

Petitioner,

—vs.—

LITTLE FLOWER'S CHILDREN'S SERVICES, RALPH CHILLION, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, CAROL PARRY, ANN CAHALAN, SUSAN MCCAULEY and JOHN AMBERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MARCIA ROBINSON LOWRY
Counsel of Record
LAUREN ANDERSON
BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties
Union Foundation—Children's
Rights Project
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourteenth Amendment guarantee a foster child fair and reasonable decision-making and the exercise of some professional judgment with regard to the enforcement of his state-created right to an appropriate education?

2. Does New York's refusal to examine whether a foster child's legal custodians exercised reasonable and professionally acceptable decision-making, with regard to educational opportunities guaranteed by state law, deprive the foster child of property and liberty without due process of law?

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THE PARTIES

The parties to this proceeding are listed in the caption. This appeal is on behalf of Frank Torres, who was a foster child in the custody of respondents, from 1964 through 1975.

The appeal concerns two sets of respondents: the City of New York, the New York City Department of Social Services and Carol Parry, Ann Cahalan, Susan McCauley and John Amberg[1] (hereinafter DSS), who had legal custody of plaintiff Frank Torres during the time he was a foster child, from 1964 until he was discharged from custody in 1975; and

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[1] Carol Parry was the administrator of Special Services for Children, the division within the New York City Department of Social Services with specific responsibility for the foster care program, at the time this action commenced. Ann Cahalan, Susan McCauley and John Amberg were all employees and agents of Special Services for Children with responsibility for supervising and approving petitioner Torres' care.

Little Flower Children's Services, the authorized child care agency with which plaintiff was placed by the DSS respondents, which had day-to-day responsibility for petitioner Torres' care, and Ralph Chillion, its executive director (hereinafter Little Flower).

OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 64 N.Y.2d 119, 485 N.Y.S.2d 15 (1984) and is set forth infra in Petitioner's Appendix at pages A2-A33. The New York State Appellate Division First Department, affirmed the Supreme Court, Special Term, without opinion, 94 A.D.2d 987, 463 N.Y.S.2d 349 (App.Div. 1st Dept. 1983). The opinion of the New York Supreme Court, Special Term, is found in Petitioner's Appendix at pages A34 through A39.

JURISDICTION

The jurisdiction of this Court is con-

ferred by 28 U.S.C. §1257(3) to review an order of the New York State Court of Appeals entered February 21, 1985, denying petitioner's motion for a rehearing of the court's order affirming the dismissal of his complaint by the Appellate Division entered December 27, 1984.

CONSTITUTIONAL PROVISIONS

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

All relevant statutes and regulations are found in Petitioner's Appendix at pages A40 to A58.

STATEMENT OF THE CASE

New York, through its state laws and regulations, has created a statutory entitlement to an appropriate education for the dependent and other neglected foster children in state custody. The New York Court of Appeals has ruled in this case that such a child may be deprived of these state-created rights without even the minimal requirement of a reasonable decision-making process.

Petitioner Frank Torres, described at the time as quiet, friendly, well-adjusted and of normal intelligence,[1] was seven years old when his mother abandoned him and DSS assumed his legal custody in 1964. DSS placed the child with Little Flower Children's

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[1] PA 18 and 59. (All references to Petitioner's appendix to the New York State Court of Appeals are referred to as PA) This case was decided on respondents' motions for summary judgment, which were based on the argument that even if petitioner's facts were true he had failed to state a legal claim.

Services, an authorized child care agency, and retained legal custody and final responsibility for his care; Little Flower assumed day to day responsibility and received per diem payment from public tax funds.[1]

Under New York law in effect at the time of Frank Torres' placement in foster care, he had statutory entitlements to

> an education appropriate for the child's needs;[2]
>
> specialized schooling if necessary;[3]
>
> review of his educational program,

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[1] Purchase of Service Contract between DSS and Little Flower, PA 171, SSL §398(6)(g).

[2] 18 NYCRR §203, filed Oct. 25, 1965. All applicable regulations are found at pages A52 through A57 of Petitioner's appendix. These are the regulations and the Board of Social Welfare's Commentary thereto which were applicable while petitioner was in state custody.

[3] Education Law §4402 (effective July 1, 1967) and 18 NYCRR §5.19 and Recommendations thereto.

if his parent or guardian considered it inappropriate, in a state administrative proceeding;[1]

an assessment of his learning abilities, bi-lingual education if necessary, and special education if he was handicapped;[2]

if he failed in his studies, an examination to identify his problems and a program to alleviate them;[3]

suitable vocational training;[4]

a service plan identifying his needs and the methods and timetable for meeting those needs, including "proper placement in school" and "remedial reading."[5]

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[1] Education Law §310 (effective July 1, 1947).

[2] Education Law §3204(2)(2a) (Laws of 1970, effective Sept. 1967), §3208 (Laws of 1947), 4404(7) (Law of 1956), 4404 (Law of 1956), SSL §398(6)(b) and 18 NYCRR §5.20.

[3] 8 NYCRR §203, filed Oct. 25, 1965.

[4] SSL 398.6(g) (Laws of 1975) and 18 N.Y.C.R.R. §5.19, and Recommendations thereto.

[5] 18 NYCRR §5.22.

Instead, Frank Torres got something very different. When he entered foster care, he spoke only Spanish. An intelligence test administered in English -- despite his custodians' knowledge of his ignorance of English -- resulted in his being labeled as retarded.[1] Instead of being placed in a special program for the retarded, where his normal intelligence would have quickly been noted, he was placed in a regular school program based on Little Flower's policy that all children should attend the school on its premises.[2]

The school, with the knowledge of Little Flower, kept young Frank Torres in the rear of the classroom where he spent his days sleeping, passed him from grade to grade, and did not obtain either evaluations of his problems or any sort of special educational

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[1] PA 60 and PA 141.

[2] PA 141-142.

services.[1] As the agency noted in a report sent to DSS:

> In school Frank is well behaved, but due to his mental retardation is unable to perform academically and in view of this his teacher assigns him a lesser work schedule.[2]

Finally, when Frank Torres was 14, he was referred to a reading specialist who determined that he was not retarded; that he could learn to read, although the delay in seeking help for his inability to read had compounded the problem; and that he was motivated to learn to read. A specific educational program was recommended, and the reading specialist volunteeered to supervise it.[3]

These recommendations were not imple-

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[1] PA 161-164.

[2] Correspondence (or dictation) unsigned, prepared by Little Flower and addressed to New York City DSS, dated 12/11/68. PA 140-141).

[3] PA 158-160.

mented, nor were any other special educational programs provided.[1] Petitioner was graduated from eighth grade, unable to read and write. Shortly thereafter, Little Flower enrolled Frank Torres in a school program for retarded children, which he left after the program itself concluded it was inappropriate for him.[2]

When Frank Torres was 18, he was discharged from foster care. Despite the many state laws and regulations enacted for his benefit, and the public funds expended on his care, he had never been offered the education and vocational training that would have given him the opportunity to live as a productive adult. The agency's discharge plan was for Frank Torres to apply for public assistance. Totally illiterate and without any skills,

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[1] PA 163-164.

[2] PA 62, PA 144.

Frank Torres could not fill out a job application or even read street signs; the only way he could distinguish the entrance of a men's restroom from a woman's restroom was by counting the number of letters on the door.

Frank Torres, neglected by his mother as a child and then further neglected by his government custodians, brought suit against DSS and Little Flower for failing to offer him the services mandated by law and for failing to engage in any professional decision-making with regard to his care.

The factual record in this case clearly demonstrates that although the respondents were at all times knowledgeable about petitioner's learning problems, they failed to make any reasonable decisions as to what services should be provided to attempt to rectify those problems. Respondents knew he spoke no English, yet for three years they failed to provide him with any bilingual education,

despite the fact that he had a state law entitlement to such services. Respondents determined, not only erroneously but arbitrarily, capriciously and wholly irrationally, that Frank Torres was retarded but failed to provide him with a special education, despite a clear statutory entitlement to a special education. When, eight years after he entered state custody, an evaluation finally showed that he was not retarded but had a learning disability, and a program was identified to rectify the disability, respondents instead placed him in a program for the retarded. And respondents refused to offer Frank Torres any vocational education although he had a clear entitlement to one.

On March 27, 1981, New York State Supreme Court Justice Francis Pecora, Jr., granted defendants-respondents' motions for summary judgment on each of plaintiff's claims in a three page opinion. (A34 to

A39) Although plaintiff's complaint raised statutory, contractual, common law and constitutional entitlements, the court ruled that because the necessary services which DSS and Little Flower failed to provide related to education, all of petitioner's claims were barred by a controlling state decision precluding recovery for education malpractice, Hoffman v. Board of Education of the City of New York, 49 N.Y.2d 121, 424, N.Y.S.2d 376 (1979).

The Appellate Division, First Department, affirmed the judgment of the Supreme Court, without opinion, on May 10, 1983, (94 A.D.2d 987, 463 N.Y.S.2d 349 (App.Div. 1st Dept. 1983)). The Court of Appeals granted petitioner's motion for leave to appeal pursuant to C.P.L.R. 5602(a) on February 21, 1984.

On December 27, 1984, the New York State Court of Appeals, in a 4-3 opinion (64 N.Y.2d

119, 485 N.Y.S.2d 15) (found at A2 to A33), affirmed the decision of the Appellate Division dismissing petitioner's complaint, similarly placing primary reliance on its earlier decisions in Hoffman v. Board of Education, supra, and Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 448 N.Y S.2d 385 (1979). With regard to Frank Torres' constitutional claim, the Court of Appeals found that whatever property rights petitioner may have had to an appropriate education were satisfied by enrolling him in a public school, and any other entitlements were too "nebulous" to lend themselves to protection through the due process clause. The Court of Appeals further construed petitioner's claim as one seeking a "hearing" prior to his deprivation even though petitioner had asserted that the appropriate process was not a hearing but one that ensured reasonable (i.e., non-arbitrary) deci-

sion-making. The dissent acknowledged that petitioner may have presented a colorable constitutional claim (A20).

Petitioner's motion for a rehearing, again asserting that the Court of Appeals incorrectly denied petitioner's constitutional claim, was denied on February 21, 1985 (A1).

REASONS FOR GRANTING THE WRIT

There are hundreds of thousands of children in foster care in this country, children whose legal status is identical to petitioner Frank Torres.[1] Abandoned or neglected by their parents, they are wholly dependent upon their legal custodians, the state, acting as

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[1] In 1981-1982 there were about 273,000 children in foster care in this country, representing about 3.8 children in care for every 1,000 children under 19 years of age nationally. Tatara, T. & Pettiford, E.K. Characteristics of Children in Substitute and Adoptive Care, (1983) The American Public Welfare Association.

parens patriae[1] on behalf of these children. As this Court has noted, foster care involves "issues of unusual delicacy, in an area where professional judgments regarding desirable procedures are constantly and rapidly changing." Smith v. Organization of Foster Families, 431 U.S. 832, 855 (1977). It is clear that foster care is a system created by the state, in New York "defined and controlled by the law of New York, for which New York pays and the goals of which New York is entitled to and does set for itself." Smith v. Organization of Foster Families, supra, 431 U.S. at 863 (Stewart, J. concurring).

It is doubtful whether the Constitution,

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[1] See 3 Blackstone Commentaries, Chapter XXVII, 426. (1854); West Virginia v. Chas. Phizel & Co., 441 F.2d 1079, 1089 (2d Cir. 1971); Finlay v. Finlay, 240 NY 429, 433 (1925) and Bartels v. County of Westchester, 76 A D 2d 517, 429 N Y S 2d 772 (1980).

even apart from New York's particular statutes, would permit a state, in its role as parens patriae, to take custody of a child, make him its ward, and then arbitrarily and irrationally treat him as New York has done so as to destroy his chances in life. But there is no need in this case to visit that question. New York's legislature has, commendably, enacted a series of measures creating entitlements to decent education and treatment. The question starkly presented here is whether those goals, standards, and entitlements are merely precatory, subject to arbitrary deprivation by the state and its agents, or whether they are meaningful and enforceable by the children for whose benefit they have been enacted. Frank Torres, one such child who is now grown up, was totally dependent upon his governmental custodians to offer him the benefits the legislature of the State of New York had mandated should be

available to foster children; the taxpayers of the state provided public funds to pay for those benefits. Petitioner has sued his custodians, contending that his constitutional rights not to be deprived of his state-created property and liberty rights were ignored, and that no professionally acceptable decision-making was exercised in denying him those rights.

It is well settled law that state-created rights may not be withheld without cause and without some sort of reasonable decision-making process, Mathews v. Eldridge, 424 U.S. 319 (1976), whether it be a full-blown hearing, Goldberg v. Kelly, 397 U.S. 254 (1970), or an inquiry by a competent and neutral fact finder. Parham v. J.R., 442 U.S. 584 (1979). This principle is applicable whether the right is based on the constitutional right to liberty, Parham v. J.R., supra, or a statutorily created property right, Perry v.

Sindermann, 408 U.S. 593 (1972); Goldberg v. Kelly, supra; Goss v. Lopez, 419 U.S. 565 (1975). Arbitrary or irrational government decision-making has long been held to violate the core values served by due process. Cafeteria Workers v. McElroy, 367 U.S. 886, 898 (1961); see also U.S. Dept. of Agriculture v. Murry, 413 U.S. 508, 514 (1973); Board of Curators v. Horowitz, 435 U.S. 78, 91-92 (1978).

The courts of the State of New York have refused to inquire into whether petitioner Frank Torres has been afforded a reasonable decision-making process -- of any sort -- with regard to enforcement of certain state-created property rights because those rights involved education, a subject the state courts have declined to examine in the context of education malpractice suits brought by children against school boards. Hoffman v. Board of Education of the City of New

York, supra, and Donohue v. Copiague Union Free School District, supra. In those cases, however, the due process rights of plaintiffs, young people living with their parents, were protected through the availability of administrative procedures to challenge education decisions, which could have been invoked by their parents (NY Education Law §310). Frank Torres brought suit against his legal "parents," the state, for failing to either invoke those administrative procedures or utilize any other professional decision-making processes. In denying him a remedy, the courts of New York have in effect ruled that rights created by state law may be withheld whenever state custodians irrationally and arbitrarily choose to withhold those rights from dependent foster children. This Court's review is essential to decide the critically important question whether the state's refusal to engage in any reasonable

or rational decision-making concerning its ward's education deprived him of property and liberty without due process of law.

I. PETITIONER HAD PROPERTY AND LIBERTY INTERESTS IN A STATE-CREATED RIGHT TO AN APPROPRIATE EDUCATION.

It has long been recognized that when the state decides to confer certain benefits or entitlements upon its citizens, it creates a constitutionally protected property right. Goss v. Lopez, supra; Perry v. Sindermann, supra; Bell v. Burson, 402 U.S. 535 (1971).

In this case, although a bare majority of the New York Court of Appeals found that petitioner was entitled to no more than enrollment in a public school (A15), the state legislature has conferred far greater rights, and, as this Court has held, the question whether a property interest has been created, is itself a federal question. E.g., Bishop v. Wood, 426 U.S. 341 (1976).

New York, through its state constitu-

tion, statutes and regulations, has conferred the right to an appropriate education on all children in the state, including handicapped children.[1] In recognition of the state's special obligation toward its most dependent and helpless children, those in state foster care custody, the state has created additional rights and imposed special obligations with regard to the provision of an appropriate education for such children. Agencies[2] are mandated to provide children in their care with an education appropriate to their needs as mandated by state law.[3] These state law mandates require an assessment of learn-

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[1] Education Law §4401 et seq.

[2] Both the New York City Department of Social Services and the voluntary child care agency with which Frank Torres was placed, Little Flower Children's Services, were included within these statutory mandates. See generally New York Social Services Law §395 et seq., 18 NYCRR 5.19 et seq.

[3] 18 NYCRR §5.19.

ing abilities and a program to alleviate learning problems, and specialized schooling if necessary.[1] In addition, children in foster care are specifically entitled to a service plan, developed by the child care agency and approved by DSS, which should include a description of "the proper placement in school" and "special services needed, e.g. remedial reading . . . " [emphasis added].[2] This plan for service "should be subject to constant evaluation and formally reviewed annually. Service should be provided in accordance with the plan."[3]

Beyond the specific statutory requirements mandating the provision of appropriate services to foster children, New York has a well developed body of case law setting forth

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[1] 18 NYCRR §5.20 and SSL §398(6)(b).

[2] 18 NYCRR §5.22.

[3] Id.

judicial recognition of the state's duty to act with reasonable care when it assumes the custody of foster children. Bartels v. The County of Westchester, 76 A.D.2d 517, 429 N.Y.S.2d 772 (2nd Dept. 1980); Andrews v. The County of Otsego, 112 Misc.2d 37, 446 N.Y.S.2d 169 (Sup.Ct. Otsego Co. 1982); Barnes v. County of Nassau, __ A.D.2d __ (App.Div. April 15, 1985), New York Law Journal, April 19, 1985, p.30, col. 1. See also Doe v. New York City Department of Social Services, 649 F.2d 134 (2nd Cir. 1981), 709 F.2d 782 (2nd Cir. 1983), cert. den. __ U.S. __ 104, S.Ct. 195 (1983).

In the present case, petitioner contended that no reasonable or professional decision-making was involved, and respondents acted arbitrarily, when they took the following actions:

> tested his i.q. in English even though he was known to speak only

Spanish;[1]

placed him in a regular classroom when he was mistakenly believed to be retarded;[2]

failed to re-test him or provide him with any special educational program when he could do mathematics at grade level but was unable to read or write;[3]

ignored the recommendations of a reading specialist's evaluation when Frank Torres was 14, but did not offer any alternative program;[4]

enrolled him in a school for the retarded when he was 16, after respondents knew he was not retarded;[5]

refused to offer him any vocational program or training whatsoever;[6] and

discharged him from foster care at age 18, unable to read or write, with only the advice to obtain pub-

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[1] PA 60 and PA 141.

[2] PA 60, PA 141-142.

[3] PA 60.

[4] PA 19, PA28, PA 164.

[5] PA 62 and PA 144.

[6] PA 19.

lic assistance.[1]

This Court has emphasized that the hallmark of property is

> an individual entitlement grounded in state law, which cannot be removed except "for cause." Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1975); Board of Regents v. Roth, 408 U.S. 564, 576-578 (1972). Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact." National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting); Arnett v. Kennedy, 416 U.S. 134, 207-208, and n.2 (1974) (Marshall, J., dissenting); Board of Regents v. Roth, 408 U.S., at 571-572, 576-577, see, e.g., Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license protected); Memphis Light, Gas & Water Div. v. Craft, supra (utility service); Mathews v. Eldridge, 424 U.S. 319 (1976) (disability benefits); Goss v. Lopez, supra (high school education); Connell v. Higginbotham, 403 U.S. 207 (1971) (government employment); Bell v. Burson, 402 U.S. 535 (1971) (driver's license);

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[1] PA 145.

Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits).

Logan v. Zimmerman Brush Co., 455 U.S. 422, 430-431 (1982). Petitioner had a property right, under New York law, to receive state-mandated services as determined after the exercise of professional judgment, and, as a ward of the state, an undoubted liberty right not to be treated and educated as if he were retarded when, in fact, there was no rational basis for doing so.

II. PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW WHEN HE WAS DENIED HIS STATE PROPERTY AND LIBERTY RIGHTS WITHOUT REASONABLE DECISION-MAKING.

Once it is determined that a state-created entitlement exists, it is necessary to determine the procedure that is due, based on the particular situation. Mathews v. Eldridge, 424 U.S. 319 (1976); Morrisey v. Brewer, 408 U.S. 471 (1972); Cafeteria Workers v. McElroy, supra.

As this Court reiterated in another case

involving the rights of foster children:

> identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Smith v. Organization of Foster Families, supra, 431 U.S. at 848.

All three of those factors weigh heavily in favor of at least the minimal requirement for reasonable and professional -- that is, non-arbitrary -- decision-making which the New York Court of Appeals refused to require.

First, the private interest in obtaining an adequate education is enormous, as is society's interest in having well-educated citizens. This Court has repeatedly recognized

the importance of an adequate education. Brown v. Board of Education, 347 U.S. 483, 493 (1954); Plyler v. Doe, 457 U.S. 203, 222 (1982); Lau v. Nichols, 414 U.S. 563, 566 (1974); Goss v. Lopez, supra.

Second, it can hardly be disputed that the necessary decisions concerning petitioner's education required careful and reasonable judgments, based on relevant facts, and that, lacking parental concern, his state custodians would necessarily have to exercise professional judgment through some sort of rational decision-making process.

This Court has carefully examined decision-making processes involving children in both Parham v. J.R., supra, and Goss v. Lopez, supra; see also Carey v. Piphus, 435 U.S. 247 (1978). In each case, the Court described the importance of a process in which professionals exercised judgments based

on all of the information reasonably available, even though a full-scale administrative hearing was not constitutionally required in each case. Nevertheless, careful decision-making was constitutionally mandated, even where the loss was minimal (in Goss a 10-day school suspension) and full-scale post-admission retention hearings were available (in Parham). The need for careful decision-making is even more acute in the present case, in which no other process of any sort is available to review the asserted denial of the critically important education to which petitioner was entitled. See, Logan v. Zimmerman Brush Co., supra; see also, Goldberg v. Kelly, supra. The state may not constitutionally authorize the deprivation of such an interest arbitrarily or without appropriate procedural safeguards, Cleveland Board of Education v. Loudermill, 53 U.S.L.W. 4306 (U.S. 1985); Cafeteria Workers v.

McElroy, supra.

The final factor to be weighed in determining what process is due, the government's interest and potential fiscal or administrative burdens, also mitigates in favor of a standard requiring careful and professional decision-making. The government is already paying millions of dollars annually for the cost of services being provided to foster children like Frank Torres.[1] It has an overwhelming interest in seeing that that money is being spent responsibly and effectively, so as to avoid the far greater state

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[1] As of June 1973, the total New York City foster care budget was $154,994,404. The federal government provided $64,725,032 of this amount with the city and state sharing payment of the remaining amount. Review of the Administration of the Foster Care Program in New York City Department of Social Services, prepared by the New York State Department of Social Services, 1974. In the fiscal year 1980-81 the total budget for New York City foster care was $350 million. Report of the NYC Comptroller of SSC Direct Care Facilities, dated June 19, 1980, p.1.

expenditures for dependency and public assistance that such arbitrary decisions will assuredly cause. Whatever slight additional cost may be incurred by enforcing a standard requiring the reasonable exercise of professional judgment is more than outweighed by the value of enforcing the mandates of the state legislature which intended to provide meaningful services to foster children like Frank Torres.

Ironically, far more in the way of procedural due process is available in New York to children fortunate enough to be raised in their own homes. New York law[1] provides a full-scale administrative hearing before the State Commissioner of Education for any child whose parents are dissatisfied with the educational program being offered to the child. Indeed, the availability of such

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[1] Education Law §310.

hearings was a major factor in the Hoffman and Donohue cases, barring state law claims for education malpractice, upon which the New York Court of Appeals based its decision in the present case.

> [N]ot to be overlooked in today's holding is the right of students presently enrolled in public schools, and their parents, to take advantage of the administrative processes provided by statute to enlist the aid of the Commissioner of Education in ensuring that such students receive a proper education.

Donohue v. Copiague Union Free School District, supra, 47 N.Y.2d at 445; 418 N.Y.S.2d at 378. See also Hoffman v. Board of Education of the City of New York, supra, 49 N.Y.2d at 127, 424 N.Y.S.2d at 380.

This is not a case in which petitioner disagrees with the exercise of professional judgments; instead petitioner contends that no professional judgment at all was exercised and that he was, in effect, abandoned by his state custodians as surely as he had been

abandoned, earlier, by his mother. This absence of professional judgment took place notwithstanding state statutory and regulatory mandates to provide "suitable" education, obtain "proper placement in school" and make "diagnostic assessments of need."

Both the New York Court of Appeals and this Court have made clear that it is inappropriate for the judiciary to be engaged in second-guessing professional judgment, so long as professional judgment has been exercised in a manner consistent with applicable professional standards. Hoffmann, supra; Youngberg v. Romeo, 457 U.S. 307 (1982). In this case, however, no professional judgment was exercised. Respondents have never disputed that claim, contending instead that their specific obligations as detailed in state law were satisfied merely by placing petitioner in the back of a public school classroom.

By its ruling in petitioner's case, the New York Court of Appeals is leaving children in foster care without a remedy when their state custodians fail to exercise reasonable, or indeed any, professional judgment to provide these dependent children with their rights to appropriate education and vocational training as guaranteed by state law.

This Court has already noted in another context its special concern that children in state custody may need special protection.

> For a child without natural parents, we must acknowledge the risk of being "lost in the shuffle."

Parham v. J.R., supra, 422 U.S. at 619.

This case presents an appropriate opportunity to reinforce the procedural role of the due process clause in minimizing the risk that state wards will indeed be lost and permanently diminished in the process, a risk all too tragically realized in this case.

CONCLUSION

For each of the aforesaid reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the New York State Court of Appeals.

Respectfully submitted,

MARCIA ROBINSON LOWRY
Counsel of Record
LAUREN ANDERSON
BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties Union - Children's Rights Project
132 West 43rd Street
New York, New York 10036

Dated: May 20, 1985

Mo. No. 164

Appellant,

vs.

Little Flower Children's Services, et al.,

Respondents.

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements.

DECISION COURT OF APPEALS

Feb 21 1985

STATE OF NEW YORK
COURT OF APPEALS

No. 607

Frank Torres,

Appellant,

v.

Little Flower Children's Services et al.,

Respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Marcia Robinson Lowry & Lauren Anderson, NYC for appellant.

Frederick A.O. Schwarz,Jr.,NYC Corporation Counsel(Karen Hutson,Pamela Seider Dolgow,& Ronald E. Sternberg of counsel) for respondent City of New York.

Martin F. Hayes & J. Russel Clune, Mineola, for resopndent Little Flower.

KAYE, J.

In Hoffman v Board of Educ. (49 NY2d 121) and Donohue v Copiague Union Free School

Dist. (47 NY2d 440), we dismissed complaints for educational malpractice, holding that as a matter of public policy the courts would not second-guess the professional judgments of public school educators and administators in selecting programs for particular students. In the appeal before us plaintiff, who never learned to read despite a public school education, seeks damages from his legal custodians for his failure to receive an appropriate education. While he urges that there are material differences from Hoffman and Donohue, we conclude that the same policy considerations bar recovery.

In 1964, when plaintiff, Frank Torres, was seven years old, his mother abandoned him and defendant New York City Department of Social Services (DSS) assumed responsibility for his care. DSS placed him with defendant Little Flower Children's Services, an authorized child care agency (Social Services Law,

§371 [subd 10]), which assumed a contractual obligation to provide him basic care, including room and board, and "the arrangement, as needed, of religious training, education and vocational training." At the time, plaintiff was fluent in Spanish but spoke and understood little English. Little Flower enrolled him in a public school operated by the New York City Board of Education on the agency's premises. Plaintiff admitted that he started to understand English "around the third grade." While he was capable of doing math work at a normal level, he began doing poorly in reading. According to a report submitted by Little Flower to DSS, plaintiff was determined in a 1967 psychological study to suffer from borderline retardation. In light of his perceived condition, teachers at the public school assigned him a lesser work load but for the most part kept him in the regular classes, allowing him to sit in back of the

classroom without participating in the instruction. Plaintiff's reading problem was regularly discussed at conferences attended by Little Flower staff members as well as the school principal and teachers. Little Flower felt that the public school was equipped to deal with this type of learning disability and did not attempt to provide supplemental reading instruction, except for a short period after seventh grade when plaintiff attended a special class.

In March 1972, a Little Flower social worker took plaintiff to a reading specialist who administered a series of tests with a view toward establishing an education plan to be initiated after plaintiff's graduation from eighth grade in June 1972. The reading specialist concluded that plaintiff was not retarded by suffered from an "extremely complex reading disability." He said, "To outline a remedial approach for Frank would be

synonymous with writing a textbook." However, he did recommend a method which had been described in detail in a designated publication.

Following the testing, plaintiff was tutored through the use of reading machines but he graduated from the eighth grade unable to read. The method recommended by the reading specialist was never implemented. However, Little Flower did arrange for further tutoring upon plaintiff's graduation from grammar school. After some months, plaintiff stopped attending the tutoring sessions because no transportation was provided and the walk took approximately 45 minutes each day. In October 1972, plaintiff was enrolled in a BOCES school and placed in a class for the educable retarded, but he was expelled after various difficulties in March 1973. Little Flower discharged plaintiff from its care in 1976.

Alleging that he was functionally illiterate, plaintiff brought this action against DSS, Little Flower, several individuals associated with them, and the Board of Education and school principal (the last two since dropped from the suit). He charged that defendants were negligent and violated the contract between DSS and Little Flower in failing to provide him with an appropriate education, and asserted a cause of action based on 42 USC §1983 because he was not afforded a hearing with respect to the deprivation of an appropriate education. On defendants' motion for summary judgment, Special Term dismissed the complaint, characterizing the negligence claim as educational malpractice and finding the contractual duties met by the placement of plaintiff in a public school. The court did not address the constitutional claim. The Appellate Division affirmed without opinion and this Court granted leave to appeal.

We now affirm.

In Donohue v Copiague Union Free School Dist. (47 NY2d 440, supra), plaintiff brought an action against the school district because he was graduated from high school unable to comprehend written English. He alleged that the school failed to evaluate his mental ability or take adequate remedial measures to deal with his learning disability. The court assumed that a tort action for educational malpractice could be stated, but nonetheless held as a matter of public policy that courts should not entertain such claims because to do so "would require the courts not merely to make judgments as to the validity of broad educational policies -- a course we have unalteringly eschewed in the past -- but, more importantly to sit in review of the day-to-day implementation of those policies." In Hoffman v Board of Educ. (49 NY2d 121, supra), plaintiff was mistakenly diagnosed as

retarded by a psychologist whose recommendation for retesting was ignored. As a result, plaintiff, a person of normal intelligence, was educated in a class for children with retarded mental development. The court found the negligence cause of action grounded in educational malpractice and therefore barred by Donohue, stating "the courts of this State may not substitute their judgment, or the judgment of a jury, for the professional judgment of educators and goverment officials actually engaged in the complex and often delicate process of educating the many thousands of children in our schools" (id., at 125-126). As we noted, "the court system is not the proper forum to test the validity of the educational decision to place a particular student in one of the many educational programs offered by the schools of this State" (id., at 127).

Plaintiff advances several arguments in

an effort to distinguish Hoffman and Donohue. First, he asserts that those decisions prevented only suits against educators whereas here the charges are asserted against those responsible for his upbringing. Second, drawing an analogy to Klostermann v Cuomo (61 NY2d 525), he argues that he is not asking the court to evaluate different educational approaches but rather to enforce duties imposed on defendants principally by statute and common law. Those arising from statute -- the Social Services Law and the Education Law -- in general (1) require DSS to care for abandoned children and supervise child care agencies, which in turn must arrange for appropriate education, and (2) allow DSS or the agency to obtain administrative review of decisions made by the school regarding a variety of programs available to needy children.[1] The common law duties, it is argued, stem from DSS's parens patriae

function and from Little Flower's responsibility for plaintiff's daily care. A third distinction offered is that defendants breached their contract, which obligated Little Flower to provide education "as needed," to comply with the Social Services Law, and to submit to DSS a detailed service plan concerning plaintiff's care. The contract also required DSS to supervise plaintiff's treatment. Finally, plaintiff asserts a deprivation of due process of law.

We cannot accept plaintiff's initial

[1] For example, DSS has the duty to care for abandoned children (Social Services Law §398, subd 2, par [b]), to provide suitable vocational training in certain circumstances (Social Services Law §398, subd 6, par [k]) and to supervise the institution in which the child is placed (Social Service Law §398, subd 6, par [g]). The child care agency must arrange for the child to receive a suitable education (18 NYCRR §441.13 [formerly §5.19]). Either organization may seek administrative review of any decision made by school oficials (Education Law §310), including those with respect to special services available for handicapped children [current version codified at Education Law §4402).

argument that even if an action grounded in educational malpractice may be barred by public policy considerations when brought against the school, a different result should obtain when this same claim is lodged against the child's legal custodians. What is at the root of the policy enunciated in Hoffman and Donohue is not the identity of the defendant but the nature of the determinations courts would be called upon to make. This policy is equally applicable whether the student challenges educational decisions made by the Board of Education or by his guardians in response to actions taken by school officials, for in either situations the court would be thrust into the position of reviewing the wisdom of educators' choices and evaluations. Here, for example, plaintiff's allegations would require the courts to assess the nature of his difficulty in learning, including such elusive factors as his

own attitude, motivation, temperament, past experience and home environment (see Donohue v Copiague Union Free School Dist., 47 N.Y.2d 440, 446 [Wachtler, J., concurring], supra), to examine Board of Education policies and their implementation by school officials -- the very role we have already declined to assume -- and then in addition to determine whether the guardians' responses to these policies and decisions constituted negligence.[2] While we have noted the right of

[2] Contrast Snow v. State of New York (__ N.Y.2d __), decided herewith. In Snow, plaintiff was under three years of age when he was admitted to the Willowbrook State School, an institution where the "patients" received continuous medical and psychological treatment, where plaintiff's record resembled a hospital or medical record rather than a school report, and where payment for treatment was made under his father's medical plan. Plaintiff was deaf, but his condition was not diagnosed. Instead, he was given an intelligence test inappropriate for deaf children, resulting in his mistaken institutionalization and consequent injury. The Appellate Division upheld plaintiff's cause of action as grounded in medical, rather than educational, malpractice. While mistaken evaluations are central to both Snow and

students and parents to question choices made by educators (id., at 445; Hoffman v Board of Educ., 49 N.Y.2d 121, 127, supra), we did not imply that the exercise of such a right would give rise to damage suits for negligence.

Plaintiff's reliance on Klostermann v Cuomo (61 N.Y.2d 525, supra) is misplaced. There, we held that courts would entertain mandamus proceedings and declaratory judgment actions brought to compel administrative agencies to carry out clearly defined, ministerial acts mandated by the Legislature -- furnishing written service plans -- even where in determining how to act -- i.e., the content of those plans -- agencies may have unreviewable discretion. Plaintiff points to no clearly defined, ministerial act mandated by the Legislature which defendants failed to

Torres, such factors as age of the child upon entry, nature of the institution and kind of care administered mark the difference between medical and educational malpractice claims.

perform. The statutes here require DSS and Little Flower to provide for a suitable or appropriate education and allow them to challenge the school's decisions regarding the programs in which the student is enrolled. Contrary to plaintiff's claim, defendants did act pursuant to their duty to provide for plaintiff's education by placing him in a public school maintained by the Board of Education. What is challenged by plaintiff, but not subject to review, is the agency discretion in the manner in which the statutory duty was fulfilled.[3]

Nor are more specific duties imposed by the government's parens patriae function to

[3] The dissent points to the various obligations the law imposes on defendants to determine a child's special needs (slip opn, pp 4-5). Plaintiff's underlying contention is not that defendants ignored any specific statutory direction to conduct reviews, for the record indicates that they conferred periodically about plaintiff's problem, but that they erroneously concluded that the public school was equipped to deal with him.

safeguard the best interests of children placed in its care, or Little Flower's responsibility to exercise reasonable care for their protection. Social service agencies or foster parents have been found liable in instances where abandoned children placed in foster care have been physically injured due to abuse or neglect (see, e.g., Bartels v County of Westchester, 76 AD2d 517; Andrews v County of Otsego, 122 Misc 2d 37), but liability has not been extended to judgments concerning a child's education. On this question, defendants urge that the only duty of those in a parental relation is to cause a child to "attend upon instruction" (Education Law, §3212, subd 2, par [b]). We need not define the responsibility of a legal custodian with respect to a child's education, however, for we assume, as we did in Donohue, that under traditional tort law concepts defendants could be held answerable for their

failure to assure plaintiff an appropriate education. Even accepting plaintiff's argument that defendants have such a responsibility, still his claim must fail because of the public policy against educational malpractice claims. Whatever the precise statutory and common law duties of a child's governmental guardians may be, they do not support an action stemming from the alleged malpractice of public school educators and administrators because such an action is not cognizable in our courts.

For the same reason, plaintiff's cause of action based on contract must also fail; enforcement of the contract as requested would require the court to decide which educational programs might have been preferable. That the source of such a duty was imposed by contract, rather than common law or statute, could not overcome the policy objections to the courts' involvement in

these matters (Paladino v Adelphi University, 89 AD2d 85). A different questions would be posed if the contract required specified services, for instance, a desigated number of hours of instruction (id., at 92).

Finally, plaintiff cannot succeed on his constitutional claim that he was deprived of his state-created entitlement to an "appropriate" education without a hearing. Plaintiff does not complain that he was deprived of any particular program he was then enjoying (see Board of Regents v Roth, 408 US 564; compare Goss v Lopez, 419 US 565). Further, the "entitlement" at issue cannot be determined through the application of objective criteria. Rather, it depends upon the decisions of professional educators as to the needs of a particular student. Such nebulous entitlements do not lend themselves to protection through the procedural due process requirement. Indeed, they do not even come

into existence until the discretionary determination as to what is appropriate is made. Though a due process protection may well apply when the child is not placed in school at all (see Patton v Dumpson, 425 F Supp 621, 625), no such claim may be advanced. (See, also, Donohue v Copiague Union Free Dist. (47 NY2d 440, 443, supra.)

Plaintiff acknowledges that recovery is precluded against the Board of Education, the party charged with actually furnishing his public school education and thus primarily at fault if he indeed received a deficient education. For the reasons set forth in Hoffman and Donohue recovery for this same alleged injury cannot be permitted against plaintiff's legal custodians. The order of the Appellate Division dismissing the complaint should therefore be affirmed.

MEYER, J. (dissenting)

Because I cannot accept the distinctions drawn by the majority between this case and Klostermann v Cuomo (61 NY2d 525) and Snow v State of New York (__ NY2d __ [decided herewith]), I respectfully dissent.

Klostermann v Cuomo (61 NY2d at 531, supra) held that "if a statutory directive is mandatory, not precatory, it is within the court's competence to ascertain whether an administrative agency has satisfied the duty imposed on it by the Legislature" and that plaintiffs in that case had "properly petitioned the courts for a declaration of their rights, whether derived from Federal or State Constitutions, statutes or regulations." Plaintiff Torres seeks damages from the city and its employees,[1] and from Little Flower Children's Services, the child-care institu-

[1] For convenience, hereafter referred to collectively as the city.

tion with which the the city contracted, for failure of the city to satisfy duties imposed upon it by statute and regulations, and for failure of defendant Little Flower to satisfy the duties imposed upon it by statute and regulations, and for failure of defendant Little Flower to satisfy the duties imposed upon it by statute and regulation [sic] as well as by its contract with the municipality. The majority, because the dereliction from duty has resulted in plaintiff's illiteracy, an educational lack, concludes that the policy against involving courts in the selection of educational programs enunciated in Hoffman v Board of Education (49 NY2d 121) and Donohue v Copiague Union Free School District (47 NY2d 440) forecloses plaintiff's claim.

Educational policy is no more involved in Frank Torres' illiteracy than it was in Donald Snow's stunted intellectual growth.

In Snow's case those in charge of his custody breached their duty by failing to ascertain that he was totally deaf; in Torres', what defendants failed to ascertain, though obliged to do so, was that he had no understanding of, or ability to speak in, any language but Spanish while he was being raised in an almost entirely English speaking environment. In Snow's case the action has been held maintainable because predicated on medical, rather than educational, malpractice; in like manner Torres' claim should be held maintainable because based on custodial, rather than educational, breach of duty.

Special Term did not discuss the duties of the city at all and as to Little Flower said only that, "The contract required arrangement for education, and plaintiff admits he was placed in a public school. As such defendant did not breach its contractual obligation." The Appellate Division affirmed

without opinion.

Summary judgment may not be granted if there is a triable issue of fact and in determining whether there is the evidence presented must be viewed in the light most favorable to the party moved against (Siegel, New York Practice, §281, p 38). On that basis, there is ample proof, when measured against the obligations of the municipal defendants under statute and regulation, and of defendant Little Flower, under statute, regulation and contract of which plaintiff was the third-party beneficiary, to require denial of defendants' motions.

As we have made clear in Tucker v Toia (43 NY2d 1) and Matter of Lee v Smith (43 NY2d 453, article 17, section 1, of the State Constitution imposes upon the State an affirmative duty to aid the needy, which clothes the Legislature with discretion to determine the means by which aid is to be

provided, but "unequivocally prevents the Legislature from simply refusing to aid those who it has classified as needy" (Tucker v Toia, 43 NY2d at 8, supra). What distinguishes this case from the Hoffman and Donohue cases is that we deal here with whether the agencies chosen to carry out the State's obligation to a needy foster child have carried out the duties imposed upon them by the Legislature and the governmental agencies acting under its aegis, not with whether the educational institution itself followed its separate, though incidentally related, obligations. And what distinguishes the obligation of defendants in this case from those of natural parents and other persons in parental relation to a child is that, although Education Law, section 3212 (subd 2, par b) imposes upon both the duty to "cause such individual to attend upon instruction," the Social Services Law imposes upon defen-

dants obligations not imposed upon natural parents by that or any other statute, or (if, for purposes of argument we accept a broad view of the parental immunity declared in Holodook v Spencer, 36 NY2d 35)[2] by common law. the overly simplistic view of Special Term, apparently accepted by the Appellate Division, that defendants had discharged their full obligation to Frank Torres by causing him to attend the public school maintained by the City Board of Education on Little Flowers' premises fails to consider the pertinent constitutional, statutory, regulatory and contractual provisions.

Section 398 of the Social Services Law provides that the city's public welfare officers "shall have powers and perform duties" including with respect to defective children

[2] See Bartels v County of Westchester (76 AD2d 517, 522) and Andrews v County of Otsago (112 Misc 2d 37, 44).

to "[o]btain admission to state or other suitable schools, hospitals, other institutions * * * in accordance with the provisions of the mental hygiene law, education law and acts relating to the family court" (subd 4, par a) and with respect to all children within their care to "[p]rovide for expert mental and physical examination of any child whom he [sic] has reason to suspect of mental or physical defect or disease" (subd 6, par b) and to "provide suitable vocational training" (subd 6, par k).

Social Services Law, section 395 permits the public official charged with those duties to administer them either directly or through an authorized agency, but the institution in which a child is placed must be conducted in accordance with applicable regulations and the placement is to be supervised by the public official (Social Services Law, §398, subd 6, par g). As the supervision requirement

indicates, administration through an agency or institution such as Little Flower does not relieve the public official of his or her statutory obligations. Those obligations are nondelegable (Bartels v County of Westchester, 76 AD2d 517, 523, supra) as was indeed recognized in the preamble to section VII and in section X (par A) of the contract between the city and Little Flower.

The regulations adopted pursuant to that authority required not only that children in the care of the institution receive suitable education as required by law (18 NYCRR 5.19, in effect at times pertinent to this csae, now 18 NYCRR 441.13) but also that a plan of service be developed for such child (18 NYCRR 5.22, now 18 NYCRR 441.14[b] and that psychiatric and psychological services, including test and examinations, be made available to children under care of the institution (18 NYCRR 520[b], now 18 NYCRR 441.15). More-

over, as to the plan of service, the State Board's Commentary to section 5.22 not only required a preliminary plan on intake which was to include "proper placement in school" and "special services needed, e.g., remedial reading, speech therapy," but also required that the plan of service "be subject to constant evaluation and formally reviewed annually," and the Commentary to section 5.20(b) recommended appropriate use of psychological services, including direction of a remedial program.

Little Flower does not dispute that it is an authorized agency governed by the above provision and that its contract with the municipal defendants required it to arrange, "as needed, religious training, education and vocational training." Its argument that its obligation is limited solely to such arrangement overlooks the facts that (1) the quoted words simply define the "Basic Care" to be

provided under the contract, (2) the contract required it to provide foster care services, (3) under section III of the contract it agreed to provide those services "in accordance with the Social Services Law, Rules of the State Board of Social Welfare, the Regulations of the New York Department of Social Services, the Inter-Agency Manual and the policies and procedures of the Department" and (4) section VII of the contract required that it provide an initial service plan within 60 days of the placement of a child, submit a semi-annual review at the end of six months and obtain reauthorization of the placement annually.

As one of the foster care children for whose benefit the contract with Little Flower was made, Frank Torres would be entitled, as a third-party beneficiary, to recover for its breach (see Seaver v Ransom, 224 NY 233).[3] And as Snow v State of New York, supra, makes

clear, the negligent failure of defendants, including Little Flower, to carry out the obligations imposed by statute or regulation may give rise to liability (see also Doe v New York City Department of Social Services, 649 F2d 782, cert. den. 104 US 195).

Considered in light of the foregoing, the record, without question, presents triable issues of fact. The claim simply is that the defendants were aware of Frank Torres' language problem but did nothing at all to remedy it. Thus it was known to defendants when he entered Little Flower that he spoke only Spanish, and an entry in his case record made a year later noted that, "Because of a language problem, communication with Frank has been minimal. He does not appear to understand the drift of a question

[3] How damages for the beach would be calculated need not be considered on this motion for summary judgment (CPLR 3212, subd b).

and his answers are confused and inappropriate." Yet no steps were taken by defendants to assist him in overcoming his language problem. The Learning Diagnostic Center later noted that Frank's "early attempts to learn to read and write were therefore surrounded by anxiety and confusion, due to his struggle with English." Instead, based on tests administered in English, he was placed in classes for the retarded, and this despite the fact that his achievements in mathematics were inconsistent with retardation. Then when finally referred to a reading specialist, who recommended specific steps to remedy plaintiff's reading problem, nothing was done during the ensuing four years that plaintiff remained in defendant's custody. And of all this the city defendants received regular reports.

Donald Snow was misdiagnosed as retarded and will recover $1,500,000 because Willow-

brook's care included medical and psychiatric services and its failure can be labeled medical, rather than educational, malpractice. Yet Frank Torres, also misdiagnosed as retarded by those who had charge of his custody and were obligated to obtain for him instruction, including the ability to read and write in English, necessary reasonably to prepare him for later life, receives nothing because the issue is said to involve educational policy. If a label is necessary, defendants' failures can properly be designated custodial malpractice. But in truth what is here involved, so the trier of fact could find, is a simple failure to carry out obligations imposed by constitution, statute, regulation and contract, which has resulted in plaintiff's illiteracy, but is wholly distinct from matters of educational policy.

* * * * * * * * * * * *

Order affirmed with costs. Opinion by Judge Kaye in which Judges Jasen, Jones and Simons concur. Judge Meyer dissents and votes to reverse in an opinion in which Chief Judge Cooke and Judge Wachtler concur.

Decided December 27, 1984

SUPREME COURT : NEW YORK COUNTY

SPECIAL TERM : PART I

- - - - - - - - - - - - - - - - - X

FRANK TORRES,

Plaintiff,

- against - Index No.

07875/77

LITTLE FLOWER CHILDREN'S SERVICES, RALPH F. CHILLION, FLORENCE PRICE, CAROL PARRY, ANN CAHALAN, SUSAN McCAULEY, JOHN AMBERG, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

- - - - - - - - - - - - - - - - - X

PECORA, J.:

The within motion was submitted in July, 1980 and granted on default. Plaintiff now moves to vacate the default and restore the motion to the calendar. Plaintiff's motion is granted on consent.

Defendants move for an order granting summary judgment in this action for personal injuries allegedly sustained by plaintiff in defendants' failure to teach plaintiff to read and write.

In 1964, at the age of 7, the NYC Department of Social Services assumed legal custody of plaintiff and pursuant to a series of contracts with Little Flower Children's Services (hereinafter Little Flower) had day to day responsibility of plaintiff's basic care including education and vocational

training.

Plaintiff attended P.S. 181 M, a school maintained by the Board of Education on the premises of Little Flower. Upon his graduation from school, plaintiff alleges that he is unable to read or write.

Plaintiff contends that 1) Little Flower was negligent in the exercise of its legal and contractual duty to care for, supervise and educate the plaintiff; 2) the Board of Education and The City of New York failed to provide plaintiff with an appropriate education and 3) the Department of Social Services breached their obligation to plaintiff as a third party beneficiary of the purchase of service agreement between Little Flower and New York City Department of Social Services. Further it is alleged that in failing to provide plaintiff with an appropriate education, the defendants violated plaintiff's rights to constitutional due process and

equal protection of the law.

The causes of action against the Board of Education are dismissed. Plaintiff argues that his cause of action is not educational malpractice, but actionable negligence.

However, plaintiff's labelling the cause of action does not prevent its dismissal as educational malpractice. The Court of Appeals has held in Hoffman v Board of Education of the City of New York, 49 NY2d 121; 424 NYS2d 376, that a cause of action for educational malpractice does not exist.

In the Hoffman case, an action was commenced to recover for an alleged failure to properly evaluate the intellect capacity of a student. The facts here are very similar. Plaintiffs alleged failure to properly evaluate and test and failure to implement a recommendation. The Hoffman Court noted, " . . . the court system is not the proper forum to test the validity of the educational

decision to place a particular student . . . any dispute concerning the proper placement of a child . . . can best be resolved by seeking a review of such professional educational judgment through the administrative processes . . . " (Supra p. 380).

The causes of action alleging breach of contractual duty to care for, supervise and educate the plaintiff are dismissed. The contract entered into with Little Flower required basic care to plaintiff, defined as:

> "The provision of room, board, clothing recreation, medical and dental care and treatment and the arrangement as needed for religious educational and vocational training."

(Special Services for children agreement for "Purchase of Child Care Services" p.3). The contract required for the arrangement for education, and plaintiff admits he was placed in a public school. As such defendant did not breach its contractual obligation.

Accordingly, the motion for summary

judgment is granted.

Settle order.

Dated: May 27, 1981.

J.S.C.

§310.Appeals or petitions to commissioner of education and other proceedings

Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals or petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatsoever. Such appeal or petition may be made in consequence of any petition:

Section is from Education Law of 1910, §890, formerly 880, renumbered 890 by L.1918, c. 252, §6. Similar provisions were contained in Education Law of 1909, §360, which was derived from Consolidated School Law of 1894, c. 556, tit. 14, §1; originally revised from L.1864, c. 555, tit. 12, §1.

§3204.Instruction required

2-a. Bilingual instruction in schools. 1. The governing board of any school district is hereby empowered to determine the circumstances and necessity wherein instruction shall be given bilingually. The said governing board shall design the necessary procedures and acquire the necessary training materials and equipment to meet the special educational needs of children of limited English speaking ability through programs designed to accomplish the following:

a. bilingual education;

b. to impart to students a knowledge of the history and culture associated with their languages;

c. to establish closer cooperation between the school and the home;

d. to provide early childhood educational programs related to the purposes of this section and designed to improve the potential for profitable learning activities by children;

e. to provide adult education programs related to the purposes of this section, particularly for parents of children participating in bilingual programs;

f. to provide programs designed for dropouts or potential dropouts having need of bilingual programs;

g. to provide programs to be conducted by accredited trade, vocational or technical schools; and

l. to provide other activities deemed desirable to further the purposes of this section.

L.1947, c. 820; amended L.1950, cc. 47, 135; L.1951, c. 124;L.1952, c. 539; L.1958, c. 14; L.1961, c. 662; L.1968, c. 304; L.1970, c. 967, §§2,3, eff. Sept. 1, 1970.

Subd. 2-a added L.1970, c. 967, §3, eff. Sept. 1, 1967.

§3205. Attendance of minors upon full time day instruction

1. a. In each school district of the

state, each minor from six to sixteen years of age shall attend upon full time instruction.

3. In each city of the state and in union free school districts having a population of more than forty-five hundred inhabitants and employing a superintendent of schools, the board of education shall have power to require minors from sixteen to seventeen years of age who are not employed to attend upon full time day instruction.

L.1947, c. 820; amended L.1959, c. 262, §1; L.1966, c. 975, §17; L.1968, c. 100; L.1969, c. 296, §§1,2, eff. July 1, 1969.

§3208. Attendance of minors, proper mental and physical condition.

5. The determination of a minor's mental or physical condition under the provisions of part one of this article shall be based upon actual examination of the minor made by a person or persons qualified by appropriate training and experience, in accordance with regulations of the state education department. The state education department shall designate persons having the required qualifications to make such mental or physical examinations on behalf of any local school authorities, except that in a city having a population of one million or more the superintendent of schools shall designate such persons.

L.1947, c. 820, eff. July 1, 1947.

§4401. Definitions

As referred to in this article

1. A "handicapped child" is one who, because of mental, physical or emotional reasons, cannot be educated in regular classes but can benefit by special services and programs to include, but not limited to, transportation, the payment of tuition to boards of cooperative educational services and public school disticts, home teaching, special classes, special teachers, and resource rooms.

3. A "non-English speaking child" means a minor who is unable to speak and understand the English language.

L.1947, c. 820; amended L.1956, c. 722, §3; L.1957, c. 951, §1; L.1964, c. 945, §2; L.1967, c. 256, eff. April 10, 1967; L.1967, c. 786, §3, eff. July 1, 1967.

§4402. Duties of education department

The state education department shall have power and it shall be its duty:

1. To maintain a register of handicapped children and to use all means and measures necessary to adequately meet the physical and educational needs of such children, as provided by law.

2. To stimulate all private and public efforts designed to relieve, care for, cure or educate handicapped children and to coordinate such efforts with the work and function of governmental agencies.

3. To formulate such rules and regulations pertaining to the physical and educational needs of such children as the commissioner of education shall deem to be in their best interests.

L.1947, c. 820; amended L.1956, c. 722, §4; L.1957, c. 718; L.1964, c.945, §3; L.1967, c.786, §3, eff. July 1, 1967.

4404. Duties of school districts

1. The board of education or trustees of each school district shall ascertain under regulations prescribed by the commissioner of education and approved by the regents of the university, the number of handicapped children in such district under the age of twenty-one years.

2. a. The board of education of each city and of each union free school district shall be required to furnish suitable education facilities for handicapped children by means of home-teaching, transportation to school or by special classes. The need of the individual child shall determine which of such services shall be rendered. Where there are ten or more handicapped children who can be grouped homogeneously in the same classroom for instructional purposes such board shall establish such special classes as may be necessary to provide instruction adapted to the mental attainments and physical conditions of such children.

3. The board of education or board of trustees of each school district, which contains less than ten handicapped children shall have power to furnish suitable educational facilities for such children by means of home-teaching or transportation to school. The needs of the individual child shall determine which of such services shall be rendered. Such board is also authorized and empowered to contract with the board of education of another school district, a board of

cooperative educational services or a vocational education and extension board of a county for the education of such children in special classes organized in the schools of such district, of such board of cooperative educational services or of such vocational education and extension board with which such contract is made.

4. The board of education of each school district in which there are ten or more handicapped children who can be grouped homogeneously in the same classroom for instructional purposes shall establish such special classes as may be necessary to provide instruction adapted to the mental attainments of such children from their fifth birthday until the end of the school year during which they attain their twenty-first birthday, or shall contract with the board of education of another school district, a board of cooperative educational services or a vocational education and extension board for the education of such children, under regulations to be established by the commissioner of education.

The board of education of each school district shall cause suitable examinations to be made to ascertain the physical, mental and social causes of such failures or "underachievement" of every pupil in a public school, not attending a special class, who has failed continuously in his studies or is listed as an "underachiever". Such examinations shall be made in such manner and at such times as shall be established by the commissioner of education, to determine if such a child is incapable of benefiting through ordinary classroom instruction, and whether such child may be expected to profit from special educational facilities.

7. The board of education of each union free, central or city school district in which there are ten or more non-English speaking children may establish such special classes as may be necessary to provide instruction adapted to such children under rules to be established by the commissioner of education.

Added L.1956, c. 722, §7; amended L.1957, c. 951, §2; L.1957, c. 952, §§1, 2; L.1959, cc. 792, 812; L.1963, c. 411; L.1964, c. 745; L.1964, c. 945, §4; L.1965, c. 866; L.1967, c. 786, §3, eff. July 1, 1967.

§4407. Special provisions relating to instruction of certain handicapped children

1. When it shall appear to the satisfaction of the department that a handicapped child, who, in the judgment of the department can reasonably be expected to benefit from instruction, is not receiving such instruction because there are no adequate public facilities for instruction of such a child within this state because of the unusual type of the handicap or combination of handicaps, the department is authorized to contract with an educational facility located within or without the state, which, in the judgment of the department, can meet the needs of such child, for instruction of such child in such educational facility, and the department is further authorized to expend for such purpose a sum of not to exceed two thousand dollars per annum for each such pupil.

Subd. 1, formerly first unnumbered paragraph, amended L.1966, c. 70, eff. Sept. 1, 1966; L.1966, c. 842, eff. July 28, 1966; L.1967, c. 786, §3, eff. July 1, 1967; numbered 1,

L.1969, c. 171, eff. July 1, 1969. L.1967 deleted "physically or mentally" following "department that a."

Social Services Law

§371. Definitions

Unless the context or the subject matter manifestly requires a different interpretation, when used in this article or in any special act relating to children,

10. "Authorized agency" means

(a) Any agency, association, corporation, institution, society or other organization which is incorporated or organized under the laws of this state with corporate power or empowered by law to care for, to place out or to board out children, which actually has its place of business or plant in this state and which is approved, visited, inspected and supervised by the board or which shall submit and consent to the approval, visitation, inspection and supervision of the board as to any and all acts in relation to the welfare of children performed or to be performed under this title,

Added L.1962, c. 690,§21; amended L.1962, c. 584, §1; L.1962, c. 947, §1; L.1965, c. 347, §1; L.1965, c. 406, §1; L.1967, c. 276, §1; L.1967, c. 479, §1; L.1969, c. 640, §1; L.1970, c. 570, §14; L.1970, c. 745, §1; L.1971, c. 782, §1; L.1973, c. 315, §1; L.1973, c. 1037, §§1,2; L.1975, c. 281, §1; L.1975, c. 427, §1.

§ 395. Responsibility of public welfare districts for the welfare of children

A public welfare district shall be responsible for the welfare of children who are in need of public assistance and care, support and protection, residing or found in its territory, insofar as not inconsistent with the jurisdiction of a family court. Such assistance and care shall be administered either directly by the public welfare official charged therewith, or by another public welfare official acting on his behalf by and pursuant to the provisions of this chapter, or through an authorized agency as defined by this chapter.

L.1940, c. 619, §13; amended L.1946, c. 200, §92; L.1965, c. 23, §2.

§ 398. Additional powers and duties of commissioners of public welfare and certain city public welfare officers in relation to children

Commissioners of public welfare and city public welfare officers responsible under the provisions of a special or local law for the children hereinafter specified shall have powers and perform duties as follows:

1. As to destitute children: Assume charge of and provide support for any destitute child who cannot be properly cared for in his home.

2. As to neglected, abused or abandoned children:

(a) Investigate the alleged neglect, abuse or abandonment of a child, offer protective social services to prevent injury to the child, to safeguard his welfare, and to preserve and stabilize family life wherever possible and, if necessary, bring the case

before the family court for adjudication and care for the child until the court acts in the matter and, in the case of an abandoned child, shall promptly petition the family court to obtain custody of such child.

(b) Receive and care for any child alleged to be neglected, abused or abandoned who is temporarily placed in his care by the family court pending adjudication by such court of the alleged neglect, abuse or abandonment; and receive and care for any neglected, abused or abandoned child placed or discharged to his care by the family court.

4. As to defective and physically handicapped children:

(a) Obtain admission to state and other suitable schools, hospitals, other institutions, or care in their own homes or in family free or boarding homes or in agency boarding homes or group homes for such children in accordance with the provisions of the mental hygiene law, education law and acts relating to the family court.

(b) Maintain supervision over such defective or physically handicapped children as are not in institutions, hospitals or schools or under the jurisdiction of the family court.

6. As to all foregoing classes of children:

(b) Provide for expert mental and physical examination of any child whom he has reason to suspect of mental or physical defect or disease and pay for such examination from public funds, if necessary.

(g) Place children in suitable instances in family homes, agency boarding homes or group homes or institutions under the proper safeguards, either directly or through authorized agencies, except that, direct placements in agency boarding homes or group homes may be made by the public welfare official only if the board shall have authorized him to operate such homes in accordance with the provisions of section three hundred seventy-four-b of this chapter and only if suitable care is not otherwise available through an authorized agency under the control of persons of the same religious faith as the child. Placements shall be made only in institutions located in this state or in such institutions located in an adjoining state as are maintained by a corporation organized under the laws of this state and having authority to maintain an institution for the care of children. However, all placements shall be made in institutions visited, inspected and supervised by the board and conducted in conformity with the rules of such board.

(h) Supervise children who have been cared for away from their families until such children become twenty-one years of age or until they are discharged to their own parents, relatives within the third degree or guardians, or adopted.

(1) In accordance with regulations of the department, provide suitable vocational training through any institution licensed or approved by the state education department, for any minor in his care who demonstrates to his satisfaction the possession of talent, aptitude and ability necessary to benefit therefrom, provided such minor could not otherwise obtain such training. Expenditures

may be made for tuition, books, supplies, and all other necessary items to enable such minor to obtain such training.

L.1940, c. 619, §13; amended L.1941, c. 172, §3; L.1944, c. 390, §1; L.1945, c. 200, §94; L.1954, c. 213, §§1, 2; L.1955, c. 350, §1; L.2957, c. 147, §1; L.1959, c. 525, §1; L.1962, c. 534, >>1 to 7; L.1962, c. 690, §§24 to 27; L.1963, c. 397, §1; L.1966, c. 256, §43; L.1966, c. 948, §1; L.1967, c. 276, §§4 to 6; L.1967, c. 277, §1; L.1967, c. 479, §3; L.1968, c. 320, §1; L.1968, c. 603, §1; L.1968, c. 839, §1; L.1969, c. 407, §107; L.1969, c. 821, §1; L.1970, c. 570, §15; L.1970, c. 963, §1; L.1971, c. 110, §70; L.1971, c. 160, §1; L.1971, c. 259, §1; L.1972, c. 270, §§3, 4; L.1972, c. 403, §1; L.1972, c. 914,§1; L.1973, c. 289, §1; L.1973, c. 510, §1; L.1974, c. 1018, §1; L.1974, c. 1020, §1; L.1975, c. 512, §1; L.1975, c. 703, §1; L.1975, c. 705, §1.

8 N.Y.C.R.R. Section 203.1 Children who fail or underachieve. **(a)** Definitions. As used in this Part:

(1) The pupils referred to in this Part are pupils not attending a special class.

(2) A pupil who has failed continuously in his studies, within the meaning of subdivision 4 of section 4404 of the Education Law, is one who has failed in two or more subjects of study for a year.

(3) A pupil who is listed as an "underachiever", within the meaning of said section, is one who, on the basis of the teacher's or teachers' judgment(s), has not achieved for a year in accordance with his capacity.

(b) Examination and recommendation. (1) Each school district shall administer suitable examinations to ascertain the physical, mental and social causes of such failures or underachievement.

(2) The physical examination shall be made by a licensed physician, and shall precede other necessary examinations. Any needed psychological examination shall be made by an approved psychologist.

(3) The results of such examination(s) shall be reviewed by the school authorities in order to determine the best procedures to alleviate or remove, insofar as possible, the causes of failure or underachievement for each child.

Historical Note
Sec. filed Oct. 25, 1965.

5.19 Education. Children under the care of the institution shall receive suitable education as required by law.

Historical Note

Sec. added, filed Oct. 30, 1964 to be eff. Oct. 30, 1964.

RECOMMENDED:

Community schools, public, private or parochial, and educational services should be used whenever practical for those children who can achieve and maintain successfully the educational standards and relationships set and practiced in the community.

The institution should undertake where possible, to help the child plan adequately for economic independence and productive usefulness to society, through an educational program commensurate with his ability. This may include guidance and financial assistance with vocational training or higher education in accordance with the child's interests and capacities.

Vocational guidance should be a continuing process, beginning on the junior high school level, in all institutions undertaking vocational training or high school education.

Children with special talents and abilities should be provided with special instruction or appropriate opportunities beyond the usual educational facilities, wherever possible.

RECOGNITION OF SPECIAL NEEDS

RECOMMENDED:

The institution should provide a special educational program under its own auspices to supplement or substitute for the community program where necessary. This may include remedial reading, arithmetic, speech correction, ungraded classes, tutoring, industrial arts and vocational training. Such an institutional program is primarily planned to meet the needs of the child who cannot satisfactorily adapt himself to the academic or emotional demands of the community system of education.

Sex education should be an integral part of the institution's preparation of the child for life. It should go beyond mere knowledge of biological functions, and concern itself with preparation for family life.

Sex education should be geared to the ages and needs of individual children. All staff should be helped to answer questions as they arise.

Formal sex education should be given only by designated personnel, on an individual and group basis as is appropriate to the child.

5.20 Treatment services. **(a)** Casework service shall be made available to all children under the care of the institution. Casework service shall be provided by a caseworker, a provisional caseworker, or a caseworker in training.

(b) Psychiatric and psychological

services, including tests and examinations, shall be made available to children under care of the institution.

Historical Note

Sec. added, filed Oct. 30, 1964 to be eff. Oct. 30, 1964.

RECOMMENDED:

The institution should employ professional caseworkers on the staff. Where distance or definite therapeutic goals make it impractical for the institution caseworkers to work directly with the parents, arrangements should be made with other recognized casework agencies to provide the service. Such service to the parents should be integrated into the overall treatment plan. Casework service should encompass:

serving parents and child concerning separation and planning for placement;

providing opportunity for a personal and confidential relationship;

acting as liaison for the child's interest with all community interests (school, agencies, etc.) and utilizing community resources as indicated;

bringing to the staff understanding of the child resulting from casework and clinical study;

meeting the need of the child for continuing and improving relationships with his family;

planning for discharge from the institution and after-care services.

Certain children in an institution will need intensive casework service. To meet their needs, the casework staff should make appropriate use of the diagnostic and therapeutic skills offered by psychiatry, psychology and other allied fields.

An appropriate cooperative casework relationship should be maintained with a responsible agency that may have had a relationship with the child and his family over a period of years, and which will continue its supervision after the child's discharge from the institution.

Psychiatric services should be used for diagnostic, consultative and treatment purposes, where indicated, and may be on a consultative or regular continuing basis. These services may profitably be used in any one, in any combination or in all of the following tasks, depending on the amount of time available and on priorities: diagnosis; consultation; psychotherapy; and in-service training of staff. Lectures and seminars for staff together with case discussions on the subject of child development and on questions of emotional disturbance, should serve as a means of developing a mental hygiene orientation throughout the institution.

Each institution, should make appropriate use of psychological services. The psychologist may be used in any one, in any combination, or in all of the following tasks, depending on available time and priorities: the psychological evaluation of the child's mental and performance ability, his educational status, and his emotional development;

remedial work on various subject matter where emotional blocks or inhibitions are retarding his learning; direction of a remedial program; or psychotherapy under psychiatric supervision.

5.22 Plan of service. There shall be a plan of service developed for each child accepted for care by each institution. A plan of service shall also be developed for the family of each child.

Historical Note

Sec. added, filed Oct. 30, 1964; amd. filed June 3, 1971 eff. June 3, 1971.
Added last sentence.

RECOMMENDED:

In the case of a child accepted as a public charge, such plan of service should be in accordance with the inter-agency agreement made with the public welfare official. Such agreements should include policy statements on admission procedures, medical and dental care, clothing and incidentals, financial agreements, casework and discharge.

The preliminary plan of service outlined in the intake process should be based on the needs of the child as tentatively determined by initial diagnosis. It should include: anticipated needs in view of the child's personality and problem; the number and nature of pre-placement visits; the type of group placement; the proper placement in school; the extent of group activity; child's and family's needs for casework help; a working plan with the family; special services needed, e.g., remedial reading, speech therapy; special diets; the need for psychiatric and

psychological services.

The plan of service should be subject to constant evaluation and formally reviewed annually. Service should be provided in accordance with the plan.

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CLERK

(2)

No. 84-1842

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

FRANK TORRES,

Petitioner,

vs.

LITTLE FLOWER CHILDREN'S SERVICES, RALPH CHILLION, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, CAROL PARRY, ANN CAHALAN, SUSAN McCAULEY and JOHN AMBERG,

Respondents.

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel for the City of
New York,
Attorney for Municipal Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 566-8306 or 566-4330

FAY LEOUSSIS,
PAMELA SEIDER DOLGOW,
of Counsel.

July 22, 1985.

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QUESTION PRESENTED

Whether petitioner, who failed to learn to read and write, despite a public school education, was deprived of property or liberty without due process of law?

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No. 84-1842

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FRANK TORRES,

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Respondents.

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

STATEMENT OF THE CASE

In 1964, when petitioner, Frank Torres, was seven years old, his mother abandoned him and respondent New York City Department of Social Services ("DSS") assumed responsibility for his care (N.Y. Soc. Serv. L., §398, subd. 6, par [k]) (PA17,

PA17, PA45, PA148-PA150).* On June 6, 1964, DSS placed him with respondent Little Flower Children's Services ("Little Flower"), an authorized child care agency (N.Y. Soc. Serv. L., §371 [subd. 10]). Pursuant to a purchase of service agreement, DSS reimbursed Little Flower for the costs which Little Flower incurred in providing for petitioner's basic care (PA 17). The contract, renewable on a yearly basis, defined the basic care to be provided children placed with the child care agency as: "[t]he provision of room, board, clothing, recreation, medical and dental care and treatment and the arrangement, as needed, of religious training, education and vocational training" (PA45, PA173). In accordance with the agreement, Little Flower arranged for petitioner to attend P.S. 181M, a school maintained by the New York City Board of Education on Little Flower's premises (PA45,

*Numbers in parentheses preceded by the letters "PA" refer to pages of Petitioner's Appendix to the New York State Court of Appeals.

PA59).*

When petitioner arrived at Little Flower in 1964, he spoke English poorly, Spanish being his native language (PA139). However, by his own admission, he could understand English "around the third grade" (PA166).

According to a report prepared by Little Flower, petitioner was determined in a 1967 psychological study to suffer from borderline retardation; he had a verbal I.Q. of 65, a performance I.Q. of 86 and a full scale I.Q. of 72 (PA140-PA141). Personnel at Little Flower were of the opinion that the school on its premises was equipped to deal with children with disabilities and petitioner was not referred elsewhere (PA143). For most of the period he attended P.S. 181M, petitioner was placed in a regular class; he was placed

*The New York City Board of Education and Florence Price, the principal of P.S. 181M while petitioner was in attendance, were originally named as defendants in this action (PA25-PA26, PA15). On his appeal to the New York State Court of Appeals, petitioner discontinued his action against both parties.

in a special class for only a short time after the seventh grade (PA167). In light of his perceived condition, teachers at the public school assigned him a lesser work load (PA140-PA141).

Throughout his attendance at P.S. 181M, petitioner was a non-reader (PA162). His reading problem was regularly discussed at conferences convened at Little Flower for the purpose of planning for his welfare (PA162). The conferences were attended by petitioner's teachers, the school's principal, and members of the psychiatric, psychological and clinical staff employed by Little Flower (A162).

In March, 1972, a Little Flower social worker took petitioner to a reading specialist, Theodore H. Haegele, who administered a series of tests "to determine the reason for the reading retardation so that adequate remediation can be initiated as well as accomplishing appropriate educational planning after graduation in June, 1972" (PA158). The reading specialist concluded that petitioner was not retarded but suffered from an "extremely complex

reading disability" which was most probably the result of subtle neurological impairment (PA159, PA160). He said: "To outline a remedial approach for Frank would be synonymous with writing a textbook" (PA160). However, he did recommend a method which had been described in detail in a designated publication (PA160). He was careful to note, however, that the process would be long and tedious and that progress would be made only in small steps (PA160).

Following the testing, tutoring in reading was arranged for petitioner by Little Flower, although the particular method recommended by the reading specialist was never implemented (PA167-A168). Little Flower arranged for further tutoring upon petitioner's graduation from eighth grade in June, 1972 (PA19, PA168). After some months, petitioner stopped attending the tutoring sessions because no transportation was provided and the sessions were not a convenient distance from his group home (PA168). In October, 1972, petitioner was enrolled in a BOCES (Board of Cooperative Educational

Services) school and placed in a class for the educable retarded, but he was expelled for behavioral reasons in March 1973 (PA144). Little Flower discharged petitioner from its care in March, 1976 when petitioner was 18 years old. (PA17).

Alleging that he is functionally illiterate, petitioner, in 1977, commenced this action for money damages against DSS, Little Flower, several individuals associated with them, and the New York City Board of Education and school principal (the last two since dropped from the suit). As pleaded in the complaint, petitioner predicated his action on three distinct theories of liability: (1) that respondents breached their legal duty to educate him in that they failed to (a) diagnose his reading deficiencies until 1972 (PA20, PA30), (b) provide him with a suitable reading and vocational program at any time (PA20, PA30), and, (c) provide him with a suitable plan for obtaining reading and vocational instruction after he was discharged from the custody of DSS (PA20-PA21, PA30); (2) that in failing to provide him with an appropriate education

and vocational training, Little Flower and DSS breached their obligation to him as a third-party beneficiary of the contract between Little Flower and DSS (PA21, PA30); and (3) that in failing to provide him with an appropriate education as guaranteed by the Constitution and laws of the State of New York, without either a hearing or other administrative proceeding, respondents violated his rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C., section 1983 (PA21, PA30-PA31).

Municipal respondents moved for summary judgment dismissing the complaint on the ground that they could not be held liable for the failure of an individual to obtain an appropriate education (PA44-PA47). Little Flower similarly moved for summary judgment on the ground that the claim sounded in educational malpractice which is not a cause of action cognizable in the courts of New York State (PA48-PA56).

Special Term granted respondents' motions for summary judgment and dismissed the complaint, characterizing the negligence claim as educational malpractice, and, as such, barred by the Court of Appeals' decision in Hoffman v. Board of Education of the City of New York, 49 NY2d 121 (1979). Special Term also found that respondents met their contractual duties by the placement of petitioner in a public school. The Court did not address the constitutional claim. The Appellate Division affirmed, without opinion. 94 AD2d 987, 463 NYS2d 349 (1st Dept., 1983).

The New York Court of Appeals affirmed the dismissal of the complaint in a decision reported at 64 NY2d 119, 485 NYS2d 15 (1984).* The Court of

*Initially, petitioner appealed to the New York Court of Appeals, as of right, on constitutional grounds invoking CPLR 5601(b). The Court of Appeals dismissed the appeal for lack of a substantial constitutional question. 60 NY2d 701 (1983). Thereafter, petitioner sought, and, on February 21, 1984, was granted leave to appeal to the Court of Appeals pursuant to CPLR 5602(1)(i). 61 NY2d 606.

Appeals held that the public policy considerations enunciated in Donohue v. Copiague Union Free School District, 47 NY2d 440 (1979) and Hoffman v. Board of Education, 49 NY2d 121 (1979) barring educational malpractice claims against school districts apply with equal force to the child's legal custodians when the same claim is lodged against them. The Court reasoned as follows (64 NY2d at 126-127):

> What is at the root of the policy enunciated in Hoffman and Donohue is not the identity of the defendant but the nature of the determinations courts would be called upon to make. This policy is equally applicable whether the student challenges educational decisions made by the Board of Education or by his guardians in response to actions taken by school officials, for in either situation the court would be thrust into the position of reviewing the wisdom of educator's choices and evaluations. Here, for example, [petitioner's] allegations would require the courts to assess the nature of his difficulty in learning, including such elusive factors as his own attitude, motivation, temperament, past experience and home environment [citation omitted], to examine Board of

> Education policies and their implementation by school officials — the very role we have already declined to assume — and then in addition to determine whether the guardian's responses to these policies and decisions constituted negligence. While we have noted the right of students and parents to question choices made by educators [citation omitted], we did not imply that the exercise of such a right would give rise to damage suits for negligence.

For the same policy reasons, the Court of Appeals held that petitioner's cause of action based on contract must also fail.

Lastly, in finding petitioner's constitutional claim to be without merit, the Court held (64 NY2d at 128-129):

> Finally, [petitioner] cannot succeed on his constitutional claim that he was deprived of his state-created entitlement to an "appropriate" education without a hearing. [Petitioner] does not complain that he was deprived of any particular program he was then enjoying. (See Board of Regents v. Roth, 408 US 564, compare Goss v. Lopez, 419 US 565). Further, the "entitlement" at issue cannot be determined through the application of objective criteria. Rather, it

> depends upon the decisions of professional educators as to the needs of a particular student. Such nebulous entitlements do not lend themselves to protection through the procedural due process requirement. Indeed, they do not even come into existence until the discretionary determination as to what is appropriate is made. Though a due process protection may well apply when the child is not placed in school at all (see Patton v. Dumpson, 425 F Supp 621, 625), no such claim may be advanced. (See, also, Donohue v. Copiague Union Free Dist. (47 NY2d 440, 443, supra).

REASONS FOR DENYING THE WRIT

Petitioner contends that "[t]his Court's review is essential to decide the critically important question whether the state's refusal to engage in any reasonable or rational decision-making concerning its ward's education deprived him of property and liberty without due process of law" (Petition at 16-18). Petitioner argues first, that he had property and liberty interests in a state-created right to an appropriate education; and second, that he was deprived of due process of law when he was denied

his state property and liberty rights without reasonable decision-making.

We submit that the New York Court of Appeals correctly determined that respondents' actions in placing petitioner in a public school maintained by the New York City Board of Education on the premises of Little Flower, based on the belief that the school was equipped to deal with children with disabilities, did not deprive him of due process. The decision is not in conflict with any decision of this Court or any other federal Court of Appeals. Further, there is no compelling federal issue of wide-spread public importance presented. This case involves the misdiagnosis of a child as retarded who, in fact, suffered from an "extremely complex reading disability" (PA159-PA160) and who never learned to read. The fact that, in hindsight, a mistake may have been made or that the best possible educational program may not have been provided does not give rise to a constitutional violation. Thus, further review is unwarranted and the petition for a writ of certiorari

should be denied.

(1)

Preliminarily, we note that there is no fundamental constitutional right to an education (Plyer v. Doe, 457 US 202, 223 (1982); San Antonio Independent School District v. Rodriguez, 411 US 1, 42 [1977]; rather, public education is committed to the control of state and local authorities [Board of Curators v. Horowitz, 435 US 78, 91 (1977); Board of Education v. Rowley, 458 US 175, 208 (1982); San Antonio Independent School District v. Rodriguez, supra, 411 US at 42; Epperson v. Arkansas, 393 US 97 (1968)]. Thus, petitioner's entitlement to an education, as he himself concedes (Petition at 17), is created and defined by state law.

Petitioner misconstrues the nature of the right to an education conferred by the New York State Legislature. The right which has been constitutionally created (NY Const., Article XI, §1) and statutorily established (N.Y. Educ. L., Art. 65) in New York is a right of entitlement of all children of the State to a free public school education, not a

right of each student within the system to an individualized level or quality of education.* Donohue v. Copiague Union Free School District, 47 NY2d 440, 443 (1979); see, Levittown UFSD V. Nyquist, 57 NY2d 27, 47-48 (1982); Patton v. Dumpson, 425 F Supp 621, 625 (SDNY, 1977); cf. Lisa H. v. State Board of Education, 67 Pa. Commw. 350, 447 A2d 669, 673-674 (Commonwealth Ct. of Pa., 1982), aff'd, 467 A2d 1127 (Sup. Ct. Pa. 1983).

"To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 US 564, 577 (1972). Petitioner claims that he was deprived of a state-created entitlement to an "appropriate" education without due process. (PA30). However, there cannot be a property right created in an "appropriate" education

*Where there is an authoritative interpretation of state law by the State's highest Court, this Court is foreclosed from an independent examination of the state law issue. See Bishop v. Wood, 426 US 341, 345-347 (1976).

in New York because, under state law, educators have absolute discretion and flexibility in determining what constitutes an "appropriate" education in each individual case. Hoffman v. Board of Education, supra, 49 NY2d 121; Donohue v. Copiague Union Free School District, supra, 47 NY2d 440. Cf. James v. Board of Education, 42 NY2d 357, 367-368 (1977).

Indeed, as the New York Court of Appeals correctly noted in this case, the "entitlement" at issue cannot be determined through the application of objective criteria but, rather, depends upon the decisions of professional educators as to the needs of a particular student. The Court properly found that such nebulous entitlements do not lend themselves to due process protection. Indeed, such "entitlements" do not even come into existence until the discretionary determination as to what is appropriate is made.

Where the grant of a benefit is within the broad discretion of the one making the decision or where the restraints on that discretion are merely

procedural, no protectable property or liberty interest is created. See Meachum v. Fano, 427 US 215, 228-229 (1975); Pugliese v. Nelson, 617 F2d 916 (2d Cir. 1980); Marciano v. Coughlin III, 510 F Supp 1034, 1037 (EDNY, 1981). In the instant case, under the controlling statutes, DSS has the duty to care for abandoned children (SSL, §395; 398, subd. 2, par [b]), to provide vocational training in certain circumstances (SSL, §398, subd. 6, par [k])* and to supervise the child care agency in which the child is placed [SSL, §398, subd. 6, par [g]). Pursuant to regulations in effect at the time petitioner was in foster care, the child care agency must arrange for the child to "receive suitable education as required by law" (formerly 18 NYCRR §5.19, presently codified as 18 NYCRR §441.13). Either agency may seek administrative review of any decision made by

*This section provides that DSS has the duty to provide suitable vocational training for any minor in its care who demonstrates to its satisfaction "the possession of talent, aptitude and ability necessary to benefit therefrom, provided such minor could not otherwise obtain such training."

school officials (N.Y. Educ. L., §310), including those with respect to special services available for handicapped children (N.Y. Educ. L., §4402).

Since the very question of what constitutes a suitable education for a particular child necessarily involves the professional judgment and discretion of educational experts charged with the duty of educating the children of New York State, petitioner did not have "a legitimate claim of entitlement" (Board of Regents v. Roth, supra, 408 US at 577) to any particular educational program or course of study. Nor did he have an entitlement to a minimal level of education. Further, this is not a case where petitioner complains that he was deprived of any particular program he was then enjoying. See Goldberg v. Kelly, 397 US 254 (1979); compare, Goss v. Lopez, 419 US 565 (1975). Therefore, no property interest requiring due process protection was created.*

*Equally unavailing is petitioner's conclusory claim, unsupported by any citation of authority, that he

(footnote cont'd on next page)

(2)

Assuming, arguendo, that petitioner had a property or liberty interest in an "appropriate" education requiring due process protection, petitioner received all the process that was due. Petitioner has abandoned his claim, made below, that respondents, in failing to provide him with an appropriate education "without either a hearing or

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* (footnote cont'd from previous page)

possessed a "liberty" interest in an appropriate education. (Petition at 17, 23). Petitioner's further claim that "as a ward of the state, [he had] an undoubted liberty right not to be treated and educated as if he were retarded when, in fact, there was no rational basis for doing so" is raised for the first time in his Petition to this Court. It is well-settled that in appeals from state courts, this Court is without jurisdiction to review federal claims that were never raised in the state court. Cardinale v. Louisiana, 394 US 437, 438 (1969). In any event, petitioner's claim is without merit. While "there can be no doubt that the meaning of 'liberty' must be broad indeed" (Board of Regents v. Roth, supra, 408 US at 572), and includes the opportunity to make a range of personal decisions concerning one's life, family and private pursuits (BAM Historic District Ass'n. v. Koch, 723 F2d 233 [2d Cir. 1983]), the concept of liberty has never been extended to a situation, such as this one, where the appropriateness of an educational program is being questioned.

any other administrative proceeding" violated his due process rights (PA30). He now appears to contend that the process that is due in this situation is "some sort of rational decision-making process" (Petition at 25). Recognizing that this Court and the New York Court of Appeals have made it clear that it is inappropriate for the judiciary to be engaged in second-guessing professional judgment (see, Youngberg v. Romeo, 457 US 307, 322-323 [1982]; Parham v. J.R., 442 US 584, 607-609 [1978]; Hoffman v. Board of Education, supra, 49 NY2d 376), petitioner contends that no professional judgment at all was exercised in his case. Petition at 29-30. The record belies petitioner's claim.

Petitioner was misdiagnosed as retarded. It now appears that his inability to learn to read was based on a "subtle neurological impairment," which all the experts agreed is not easily overcome. The diagnosis was based both on tests administered by experts and on petitioner's school performance, which indicated borderline retardation. His educational program was geared accordingly. The

record simply does not support petitioner's assertion that absolutely nothing was done in his case. Petitioner was placed in and attended a public school maintained by the New York City Board of Education based on Little Flower's assessment that the school was equipped to deal with children with disabilities. His reading problem was regularly discussed in conferences held at Little Flower which were attended by professional educators, social workers and psychologists from both the Board of Education and Little Flower for the purpose of planning for his welfare. At age 14, special testing was arranged for him by Little Flower. When petitioner's problem was diagnosed, tutoring in reading was arranged for him, which he voluntarily discontinued. When petitioner graduated from eighth grade, he was enrolled in a BOCES program, but problems developed and he was expelled for behavioral reasons. As the Court of Appeals noted in this case, "[petitioner's] underlying contention is not that defendants ignored any specific statutory direction to conduct reviews, for the record

indicates that they conferred periodically about [petitioner's] problem, but that they erroneously concluded that the public school was equipped to deal with them." 64 NY2d at 127, n. 3.

Thus, at the heart of this case is petitioner's disagreement with respondents' professional judgment that P.S. 181M, the public school located on the premises of Little Flower, could offer petitioner an appropriate education. However, the fact that, in hindsight, a mistake may have been made based on a misdiagnosis of petitioner's condition and the best possible program may not have been provided does not rise to the level of a due process violation. In Bishop v. Wood, supra, 426 US at 349-350 (1976), this Court noted in another context that:

> Federal court is not the appropriate forum in which to review the multitude of ... decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal

judicial review for every such error.

Contrary to petitioner's assertions, the children of New York State are not left remediless if they, or their parents or legal guardians, disagree with the educational program offered to them. New York law provides a full-scale administrative hearing before the State Commissioner of Education for any child whose parents or legal custodians are dissatisfied with the educational program being offered to the child. N.Y. Educ. L., §310; Donohue v. Copiague Union Free School District, supra, 47 NY2d at 445; Hoffman v. Board of Education of the City of New York, supra, 49 NY2d at 127. Petitioner's complaint is that his legal custodians did not invoke this procedure in his particular case (Petition at 16). However, that decision also turns on the exercise of professional judgment and discretion. As noted, Little Flower was of the belief that the school on its premises was equipped to deal with children with disabilities and petitioner was not

referred elsewhere.* Such a decision is for the educational experts and the professionals on the staff of DSS and Little Flower and not for the courts. The New York Court of Appeals has repeatedly held that the courts of New York may not substitute their judgment on educational matters for the professdional judgment of educators and government officials "actually engaged in the complex and often delicate process of educating the many thousands of children in our schools." Hoffman v. Board of Education, supra, 49 NY2d at 125-126; accord: Donohue v. Copiague Union Free School

*It is significant that the New York Court of Appeals held in this case that respondents' statutory duties were met by placing petitioner in a public school operated by the New York City Board of Education. 64 NY2d at 127. See, N.Y. Educ. L., §§3205(1)(a), 3212. The Court further noted that the Board of Education was the party charged with furnishing petitioner's public school education and was thus primarily at fault if he indeed received a deficient education. 64 NY2d at 129. As noted, petitioner acknowledged in the Court of Appeals that recovery was precluded against the Board of Education and, consequently, dropped the Board of Education as a party to this lawsuit.

District, supra, 47 NY2d 440; Bokhair v. Board of Education, 43 NY2d 855 (1978); James v. Board of Education, supra, 42 NY2d at 367-368; Paladino v. Adelphi University, 89 AD2d 85, 91-92 (2d Dept., 1982). This Court has similarly cautioned that courts "lack the 'specialized knowledge and experience' necessary to resolve persistent and difficult questions of educational policy' ". Board of Education v Rowley, supra, 458 US at 208, quoting San Antonio Independent School District v. Rodriguez, supra, 411 US at 42. See Youngberg v. Romeo, supra, 457 US at 323-324 ("courts should not ' "second-guess the expert administrators on matters on which they are better informed" ' ").

Moreover, petitioner had a post-deprivation remedy available to him in the nature of an Article 78 proceeding* in State court which he, in fact, utilized. See Hudson v. Palmer, ___ US ___, 104 S Ct 3194, 3204 (1984); Parratt v. Taylor, 451 US 527,

*N.Y. Civ. Prac. Law and Rules, Article 78.

536-37, 540 (1984). As noted by petitioner, himself, at the same time he initiated this action, petitioner filed an Article 78 proceeding* against the New York City Board of Education and others "seeking to obtain the education to which he was entitled under New York law". Petitioner's Brief to New York Court of Appeals, p. 52, n. 36. Special Term directed the Board of Education "to furnish Torres, insofar as is feasible, with appropriate evaluation and special program services. . . ." Torres v. Parry, supra, decision dated September 9, 1977. On a subsequent motion in that case, Special Term ordered the Board of Educaton to either provide petitioner with a program "where he may learn to read and write," or be liable for the cost of a private program of his own choosing. Torres v. Parry, NYLJ, June 8, 1978, p. 10, col. 5, N.Y. Co. Sup. Ct.**

*Torres v. Parry, Index No. 10666/77 (N.Y. Co., Sup. Ct., 1977).

**Petitioner, had, in fact, begun a remedial reading program at Long Island Jewish-Hillside Medical Center in 1977 (PA152-PA154).

In sum, petitioner had no state-created property or liberty interest in an "appropriate" education protected by the due process clause of the Fourteenth Amendment. Assuming, arguendo, that such an interest was created, petitioner received all the process that was due by the exercise by his legal guardians and school officials of professional judgment (based on tests administered to him and on petitioner's school performance), as to what educational program was appropriate for him. Further, New York State provides both administrative review in the form of a hearing before the State Commissioner of Education (N.Y. Educ. L., §310) to challenge educators' choices as to appropriate educational programs, and judicial review of agency determinations in the form of an Article 78 proceeding in state court to challenge decisions made by administrative officials. In light of the above, the petition should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

July 22, 1985

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel for
The City of New York,
Attorney for Municipal Respondents.

FAY LEOUSSIS,
PAMELA SEIDER DOLGOW,
of Counsel.

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No. 84-1842

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK TORRES,

Petitioner,

—vs.—

LITTLE FLOWER'S CHILDREN'S SERVICES, RALPH CHILLION, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, CAROL PARRY, ANN CAHALAN, SUSAN MCCAULEY and JOHN AMBERG,

Respondents.

BRIEF FOR RESPONDENTS, LITTLE FLOWER CHILDREN'S SERVICES AND RALPH CHILLION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MARTIN F. HAYES
Counsel of Record
J. RUSSELL CLUNE, P.C.
Attorney for Respondents, Little Flower Children's Services and Ralph Chillion
290 Old Country Road
Mineola, New York 11501
(516) 248-6600

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QUESTIONS PRESENTED

1. Whether petitioner's due process rights under the United States Constitution were violated by the New York State Court of Appeals' refusal to recognize a cause of action sounding in educational malpractice?

2. Whether petitioner has exhausted his State created remedies thus making this lawsuit justiciable and subject to the jurisdiction of this Court?

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OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 64 N.Y.2d 119, 485 N.Y.S.2d 15 (1984) and is set forth in Petitioner's Appendix at pages A2-A33. The New York State Appellate Division, First Department, affirmed the New York State Supreme Court, Special Term, without opinion, 94 A.D.2d 987, 463 N.Y.S.2d 349 (App. Div. 1st Dept. 1983). The opinion of the New York State Supreme Court, Special Term, is found in Petitioner's Appendix at pages A34-A39.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

This case allegedly involves the Fourteenth Amendment, Section 1, to the United States Constitution.

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

This case allegedly involves the statutes and regulations found in Petitioner's Appendix at pages A40-A58.

STATEMENT OF THE CASE

In 1964 Little Flower Children's Services assumed a contractual obligation to provide petitioner basic care, including the arrangement of education and vocational training.[1] Little Flower's contract was with the New York City Department of Social Services (DSS) who had assumed responsibility for petitioner's care since he had been abandoned by his mother.[2]

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1 PA17, PA45 (All references to Petitioner's Appendix to the New York State Court of Appeals are referred to as PA).

2 PA 17, 45, 148-150.

Respondent Little Flower enrolled petitioner in a public school (P.S. 181M) maintained by the New York City Board of Education on Little Flower's premises. (PA 45, 59) Petitioner's native language is Spanish, but he could understand English by the third grade.

During the time of his attendance at P.S. 181M petitioner could not read English. This inability to read was regularly discussed at conferences attended by petitioner's teachers, the school's principal and members of the psychiatric, psychological and clinical staff employed at Little Flower.[3]

In March, 1972 petitioner was taken by a Little Flower social worker to a reading specialist. This specialist concluded that plaintiff had an extremely complex reading problem and that any remedial process would be long and tedious and that progress would be made only in small steps.[4]

After petitioner's visit to this specialist, Little Flower arranged tutoring in reading for him.[5] In June, 1972 petitioner was graduated from the eighth grade and further tutoring was arranged. Petitioner stopped attending this tutoring since no transportation was provided and the walk took approximately 45 minutes each way.[6]

In October, 1972, petitioner was enrolled in a BOCES school and placed in a class for the educable retarded, but he was expelled in March, 1973 due to various difficulties.[7]

The claims asserted in this action are predicated on three theories: (1) that respondents breached their legal duty to educate petitioner; (2) that respondents breached their obligations to petitioner as a third-party beneficiary of the purchase

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3 PA 162.

4 PA 158.

5 PA 167-168.

6 PA 168.

7 PA 144.

of service contract between Little Flower and DSS,[8] and (3) that in failing to provide him with an appropriate education as guaranteed by the Constitution and laws of the State of New York, without either a hearing or other administrative proceeding, respondents violated petitioner's rights under the Due Process Clause of the 14th Amendment to the United States Constitution and 42 U.S.C., section 1983.[9]

Respondents moved for summary judgment and said motions were granted at Special Term, New York State Supreme Court, Justice Francis Pecora, Jr., presiding.[10] The decision at Special Term was based on a 1979 New York Court of Appeals decision which barred lawsuits in New York sounding in educational malpractice. *Hoffman v. Board of Education of the City of New York*, 49 N.Y.2d 121, 424 N.Y.S.2d 376 (1979).

The Appellate Division, First Department, affirmed the judgment of the Supreme Court, without opinion, on May 10, 1983 (94 A.D.2d 987, 463 N.Y.S.2d 349 (App. Div. 1st Dept. 1983)). The Court of Appeals granted petitioner's motion for leave to appeal pursuant to C.P.L.R. 5602(a) on February 21, 1984.

On December 27, 1984, the New York State Court of Appeals affirmed the decision of the Appellate Division dismissing petitioner's complaint. The opinion is reported at 64 N.Y.2d 119, 485 N.Y.S.2d 15.[11]

Petitioner moved for a rehearing and this motion was denied on February 21, 1985.[12]

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8 PA 21, 30.

9 PA 21, 30-31.

10 PA 34-39.

11 PA 2-33.

12 PA 1.

ARGUMENT

I. Petitioner has failed to demonstrate a withholding of any state entitlement which gives rise to a deprivation of his Constitutional Rights under the Due Process Clause of the Fourteenth Amendment.

Petitioner, in order to have a writ of certiorari issued to review the decision of the New York State Court of Appeals in this case, must show that he had a state-created entitlement to an appropriate education. However, the New York Court of Appeals has determined that no such entitlement exists and therefore there cannot be, and has not been, a deprivation of a state-created entitlement.

The entitlement to which petitioner lays claim could not be determined through the application of any objective criteria. The subjective decisions of education officials would have to be reviewed with regard to each student.

The New York Court of Appeals, while recognizing that in such cases, a wrong may have been committed, does not recognize such action as giving rise to a cognizible tort. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440 at 445.

In the cases of *Donohue* and *Hoffman v. Board of Education of the City of New York*, 49 N.Y.2d 376 (1979) the New York Court of Appeals refused to recognize causes of action based upon educational malpractice. These refusals were based on a strong public policy against the practice of having the Courts of New York substitute their judgment, or the judgment of a jury, for the professional judgment of educators and governmental officials actually engaged in the complex and often delicate process of educating the many thousands of students in New York schools. *Donohue*, 49 N.Y.2d at 125-126.

The Court of Appeals in the instant case determined that it is not the identity of the defendants which is at the root of the

policy enunciated in *Hoffman* and *Donohue*, but the nature of the determinations courts would be called upon to make.[13]

To recognize such a cause of action the courts in the instant case would be required to assess the nature of petitioner's "difficulty in learning, including such elusive factors as his own attitude, motivation, temperament, past experience and home environment . . . to examine Board of Education policies and their implementation by school officials—the very role we have already declined to assume—and then in addition to determine whether the guardians' responses to these policies and decisions constituted negligence.[14] The Court refused to go, as urged by petitioner, a step beyond where it would not go in *Donohue* and *Hoffman*.

Since there is no state-created entitlement to a specific education no due process protection need be applied when, with the wisdom gained with 20/20 hindsight, it is learned that the program of education chosen for a particular individual, was not the best one. While a violation of due process may apply if a child is not placed in school at all, no such claim is made here. *Patton v. Dumpson*, 425 F.Supp. 621 (S.D.N.Y. 1977).

II. Petitioner has failed to exhaust his state remedies, therefore this case is not ripe for consideration by this Court.

If a person feels aggrieved by the nature of the education he is receiving or has received, he may appeal or petition to the commissioner of education.[15]

Petitioner commenced the instant action in 1977, when he was approximately 20 years of age. From the time of his discharge from Little Flower even until the present there is no

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13 PA 12.

14 PA 12-13.

15 Education Law § 310 (A40).

indication that petitioner undertook this course of action. It is the course of action most likely to remedy the wrong petitioner claims, an inability to read.

CONCLUSION

For each of the reasons set forth herein it is respectfully submitted that a writ of certiorari should be denied.

Dated: July 19, 1985

Respectfully submitted,

MARTIN F. HAYES
Counsel of Record
J. RUSSELL CLUNE, P.C.
290 Old Country Road
Mineola, New York 11501
(516) 248-6600